

SERVICE DATE – MAY 18, 2023

SURFACE TRANSPORTATION BOARD

DECISION

Docket No. FD 36619

THE CITY OF NORTH CHICAGO, ILL.—PETITION FOR DECLARATORY ORDER

Digest:¹ The Board declines to issue a declaratory order relating to a dispute concerning an easement for a water main that crosses under the rail property of 2nd & Main, LLC, in North Chicago, Ill.

Decided: May 17, 2023

On June 21, 2022, the City of North Chicago (the City) petitioned the Board for a declaratory order relating to an easement for a water main that crosses under the rail property of 2nd & Main, LLC (2nd & Main), in North Chicago, Ill. The City seeks a finding from the Board that a condemnation action filed on behalf of the City in the 19th Judicial Circuit Court of Illinois (Illinois Circuit Court) against 2nd & Main, seeking to obtain an after-the-fact easement for an existing water main, is not preempted by the Interstate Commerce Act, as amended by the ICC Termination Act of 1995 (ICCTA), Pub. L. No. 104-88, 109 Stat. 803, because the water main does not unreasonably interfere with railroad operations. (Pet. 2.) In the alternative, the City requests that the Board find that a state trial court lacked any basis to order the City to reinforce its entire water main on the property of 2nd & Main as a remedy for an “unlikely partial preemption in the future” that could result from 2nd & Main’s rail operations. (*Id.*) For the reasons discussed below, the Board will decline to issue a declaratory order.

BACKGROUND

Since 1961, a portion of one of the City’s twenty-four-inch transmission water mains has continuously operated underneath property located between Main and Marquette Streets, in North Chicago (the Property), which has been owned by 2nd & Main, a Class III rail carrier, since 2014. (Pet. 2-3; 2nd & Main Reply 2-3, Aug. 22, 2022.) The City states that it erroneously did not acquire an easement to operate the water main because the city attorney failed to record it at the time the water main was installed. (Pet. 3.) The record indicates that the Property is a former lumber mill that includes rail track running from the Union Pacific Railroad main line that lies to the west of the Property to a former lumber-storage shed. (Pet. 3.) The existing track does not cross the water main. (Pet. 11; 2nd & Main Reply 2, Aug. 22, 2022.) In 2017, 2nd & Main obtained authority from the Board to acquire and operate the existing track as a Class III

¹ The digest constitutes no part of the decision of the Board but has been prepared for the convenience of the reader. It may not be cited to or relied upon as precedent. See Pol’y Statement on Plain Language Digs. in Decisions, EP 696 (STB served Sept. 2, 2010).

carrier through a notice of exemption. 2nd & Main, LLC—Acquis. & Operation Exemption—Norland N. Chicago, LLC, FD 36106 (STB served Mar. 22, 2017). 2nd & Main states that it intends to further develop the Property with additional ancillary tracks and to use those tracks, which may cross the water main, for railroad operations. (2nd & Main Reply 1, Aug. 22, 2022.) The City maintains, however, that 2nd & Main’s plans are too vague and speculative to warrant a finding of preemption, (Pet. 5, 9, 11), but that in any event, an easement for the existing water main would not unreasonably interfere with the use of the Property for railroad purposes, (*id.* at 9, 11.)

According to the City, it attempted to purchase an easement for the water main following 2nd & Main’s purchase of the Property, but when that proved unsuccessful, 2nd & Main filed an inverse condemnation lawsuit on July 13, 2017, in the Illinois Circuit Court. (*Id.*) The inverse condemnation action, however, was terminated with the filing of the City’s own condemnation action seeking to compel its acquisition of the water main easement. (*Id.*) Thereafter, 2nd & Main filed a motion for partial summary judgment seeking a finding from the court that the condemnation action was preempted under 49 U.S.C. § 10501(b) to the extent that the proposed easement would unreasonably interfere with 2nd & Main’s railroad operations. (Pet. 6-7; 2nd & Main Reply 3, Aug. 22, 2022.) In its motion, 2nd & Main argued that any easement granted by the court must require that the water main be reinforced, consistent with railroad standards, so that 2nd & Main will be able to conduct its railroad operations above ground without potentially harming the water main. (2nd & Main Reply 3, Aug. 22, 2022.) The parties informed the Board that the Illinois Circuit Court found the condemnation action to be preempted under § 10501(b), noting that, without reinforcement of the entire water main under the Property, the existing pipe would unreasonably interfere with current or future railroad operations. (Pet. 7; 2nd & Main Reply 3-4, Aug. 22, 2022.) The court, therefore, granted the motion for partial summary judgment and ordered the City to reinforce the entire water main under the property of 2nd & Main. (Pet. 7.)

Subsequently, the City filed an appeal in the 2nd District Appellate Court of Illinois (Illinois Appellate Court), which affirmed the Illinois Circuit Court’s finding that the condemnation action was preempted. See City of N. Chicago v. 2nd & Main, LLC, Case No. 2-21-0454, slip op. at 11-12 (Ill. App (2d) Apr. 20, 2022). The Illinois Appellate Court, however, vacated the remedy portion of the Illinois Circuit Court’s order, instructed the Illinois Circuit Court to stay the proceedings, and directed the City to petition the Board “to resolve the parameters of [the Board’s] jurisdiction and any relief compatible with the parties’ interests.” *Id.* at 31.

The City then filed its petition for declaratory order with the Board on June 21, 2022, specifically seeking a finding that the state court condemnation action was not preempted by § 10501(b), or, in the alternative, that the state trial court lacked any basis to order the City to reinforce its entire water main located at the Property. (Pet. 2.) 2nd & Main responded on August 22, 2022,² contending, among other things, that the Board and the courts, including state courts, have concurrent jurisdiction to decide issues of federal preemption and that the

² By decision served on July 5, 2022, the reply deadline was extended at the unopposed request of 2nd & Main.

preemption issue had already been determined by the state courts. (2nd & Main Reply, 3, 9, Aug. 22, 2022.) 2nd & Main, therefore, requests that the Board require the City to remove the existing water line and install a new, reinforced water line across the entirety of 2nd & Main's property or, in the alternative, require the City to remove and relocate its water line and subsequently restore the property to its original condition. (Id. at 18.)

PROCEDURAL MATTERS

On August 31, 2022, the City filed a rebuttal to 2nd & Main's reply to the petition. Thereafter, on September 16, 2022, 2nd & Main filed an "Objection" asking the Board to strike the City's August 31 filing or, in the alternative, to allow 2nd & Main to respond to the City's pleading. Subsequently, the parties submitted additional pleadings, and on December 1, 2022, 2nd & Main filed a "Motion to Reject" a November 9, 2022 surreply filed by the City.

While the Board's regulations do not permit "replies to replies," 49 C.F.R. § 1104.13(c), in the interest of a more complete record, the Board will deny 2nd & Main's requests to strike the City's August 31 and November 9 submissions and will accept into the record all filings submitted to date. See, e.g., City of Alexandria, Va.—Pet. for Declaratory Ord., FD 35157, slip op. at 2 (STB served Nov. 6, 2008).

DISCUSSION AND CONCLUSIONS

Under 5 U.S.C. § 554(e) and 49 U.S.C. § 1321, the Board may issue a declaratory order to terminate a controversy or remove uncertainty. The Board has broad discretion to determine whether to issue a declaratory order. See Bos. & Me. Corp. v. Town of Ayer, 330 F.3d 12, 14 n.2 (1st Cir. 2003); Intercity Transp. Co. v. United States, 737 F.2d 103 (D.C. Cir. 1984); Delegation of Auth.—Declaratory Ord. Proc., 5 I.C.C.2d 675 (1989). For the reasons explained below, the Board will decline to exercise its discretionary authority to issue a declaratory order here.

The preemption question posed by the City's petition has already been decided by the Illinois state courts. In the City's state court action, the City sought an easement pursuant to state condemnation law following unsuccessful contractual negotiations with 2nd & Main. (Pet. 3.) The Illinois Circuit Court granted partial summary judgment in favor of 2nd & Main and found that the condemnation action was preempted by § 10501(b). On appeal, the Illinois Appellate Court affirmed the Illinois Circuit Court's finding that the condemnation action was preempted. See City of N. Chicago, Case No. 2-21-0454, slip op. at 11-12. In doing so, the Illinois Appellate Court specifically "vacate[d] the remedy section of the [Illinois Circuit Court]'s judgment" only, and it instructed the Illinois Circuit Court to stay the proceeding and directed the City to petition the Board "to resolve the parameters of [the Board's] jurisdiction and any relief compatible with the parties' interests." Id. at slip op. 31.

Issues involving federal preemption under § 10501(b) can be decided either by the Board or the courts in the first instance as "both the Board and courts have concurrent jurisdiction to determine preemption." Brookhaven Rail Terminal—Pet. for Declaratory Ord., FD 35819, slip op. at 4 (STB served Aug. 28, 2014). See also, e.g., City of Sammamish, Wash.—Pet. for

Declaratory Ord., FD 36161, slip op. at 4 (STB served Mar. 29, 2018); Ingredion Inc.—Pet. for Declaratory Ord., FD 36014, slip op. at 3 (STB served Sept. 30, 2016) (denying request to issue a declaratory order on preemption where case was remanded back to state court based on the federal court’s finding of no complete preemption).

Here, the Illinois state courts already have determined that, “as pleaded, [the City’s] proposed condemnation action is preempted,” and the Board does not interpret the Illinois Appellate Court’s referral as seeking a determination by the Board regarding that same question. See City of N. Chicago, Case No. 2-21-0454, slip op. at 21, 31. While the Illinois Appellate Court directed a referral to the Board with respect to the “parameters of [the Board’s] jurisdiction,” id., it is clear from the entirety of the court’s order that it had affirmed the Illinois Circuit Court’s determination on preemption of the City’s action “as pleaded” (i.e., seeking an unconditional easement) and that it was not suggesting that any referral to the Board should revisit that issue. See id. at 21, 28. For this reason, the Board will decline to issue a declaratory order.³

Instead, as noted, the state court directed the City to petition the Board “to resolve the parameters of [the Board’s] jurisdiction and any relief compatible with the parties’ interests.” Id. at 31. Although the Board is denying the City’s petition for declaratory order, it will provide the following guidance in response to the court’s request.

An important aspect in determining whether preemption applies is often the degree of interference or potential interference with rail operations. See, e.g., Wichita Terminal Ass’n—Pet. for Declaratory Order, FD 35765, slip op. at 5-7 (STB served June 23, 2015); Maumee & W. R.R.—Pet. for Declaratory Ord., FD 34354, slip op. at 2-3 (STB served Mar. 3, 2004); E. Ala. Ry.—Pet. for Declaratory Ord., FD 35583, slip op. at 4-7 (STB served March 9, 2012). Therefore, in cases where preemption is found under § 10501(b), a court may be able to craft a remedy to avoid preemption. Here, for example, the Illinois Circuit Court may be able to craft an order granting the City’s requested easement with a condition that, should current or future rail operations cross over the existing water main, the City must reinforce—to current railroad standards—the portion(s) of the water main that may interfere with rail operations or relocate the water main. An easement with such a condition could allow the City to avoid unreasonable interference with rail operations and consequently may not be preempted under § 10501(b).

³ Additionally, contrary to 2nd & Main’s suggestion, 49 U.S.C. § 11704 is not relevant to the resolution of this petition. (See, e.g., 2nd & Main Reply 9-10, Aug. 22, 2022; City Reply 3, Aug. 31, 2022.) Section 11704 only applies to claims for violations of the Interstate Commerce Act, and no such violations have been alleged here. See 14500 Limited LLC—Pet. for Declaratory Ord., FD 35788, slip op. at 5 (STB served June 5, 2014) (explaining that § 11704 and the Interstate Commerce Act do not address or provide any remedies for state law property issues).

Under the circumstances, as described above, the Board in its discretion will deny the City's petition and decline to issue a declaratory order.⁴

It is ordered:

1. 2nd & Main's motions to strike are denied.
2. The City's August 31, 2022, and November 9, 2022 responses and all other surreplies by both parties, to date, are accepted into the record.
3. The petition for declaratory order is denied.
4. This decision is effective on its service date.

By the Board, Board Members Fuchs, Hedlund, Oberman, Primus, and Schultz.

⁴ Because this decision denies the petition for declaratory order, the Board need not address other issues raised by the parties, such as 2nd & Main's argument regarding the election of remedies. Additionally, parties are reminded that the Board's Rail Customer and Public Assistance Program (202-245-0238; rcpa@stb.gov) is available to stakeholders to facilitate informal, private-sector resolution of issues, without litigation, wherever possible.